



# City of Morro Bay

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March 3, 2006

Mr. Jeffrey Young, Chairman  
Regional Water Quality Control Board  
895 Aerovista Way, Suite 101  
San Luis Obispo, CA 93401-7906

Subject: Response to the Natural Resources Defense Council document, *Time is of the Essence: The Legal and Technical Reasons Why EPA and the Regional Board Must Deny the 301(h) Waiver and Require Upgrade of the Morro Bay-Cayucos Sewage Plant "As Fast As Possible"*

Dear Chairman Young,

Thank you for this opportunity to respond to the comments contained in the Natural Resources Defense Council (NRDC) document, *Time is of the Essence: The Legal and Technical Reasons Why EPA and the Regional Board Must Deny the 301(h) Waiver and Require Upgrade of the Morro Bay-Cayucos Sewage Plant "As Fast As Possible"* (NRDC Comments).

The City of Morro Bay and the Cayucos Sanitary District (MBCSD) have worked cooperatively and proactively with RWQCB and EPA staff for the past three years to develop a 9.5 year time schedule (the Schedule) for upgrading the MBCSD treatment plant to full secondary standards. It has required a tremendous amount of work, patience, and cooperation on the part of all parties involved. MBCSD would like to continue to work with the RWQCB and EPA in the cooperative and productive manner that has set the tone for our relationship over the last three years. Although there have been many areas of disagreement, the process has worked as designed and most issues have been successfully resolved. By working in a cooperative fashion with the best interest of the environment and all parties involved, we have managed to avoid the problems, pitfalls, and obstacles that have plagued other communities and which have resulted in protracted legal and administrative battles that have taxed the patience, resources, and funding of both the communities and regulatory agencies involved in these processes. MBCSD feels that the process to date has been a successful one and looks forward to continuing to work with all interested and willing parties involved in keeping the process moving toward a positive and successful conclusion. At the same time, MBCSD's fiduciary responsibility is to its ratepayers to provide the most environmentally friendly wastewater treatment system that will provide cost effective treatment for the next twenty years.

The joint hearing scheduled on March 24, is not simply a hearing for renewal of the 301(h) modified discharge permit for the MBCSD, it is also involves the approval of the Settlement Agreement for Issuance of Permits to and Upgrade of the Morro Bay – Cayucos Wastewater Treatment Plant (the Agreement). The Agreement stipulates that MBCSD will meet full secondary treatment standards by no

later than June 2015, per the milestones contained within the Schedule. The Schedule as outlined allows the local ratepayers and residents full public involvement and discussion on the environmental, social, technical and economic issues that other similar communities have been afforded. The Grand Jury concurred with this when they emphasized the need “for citizen input into the process.”<sup>1</sup>

On February 3, the NRDC provided public comment on the *Joint Notice of Proposed Actions on Reissuance of Waste Discharge Requirements [NPDES Permit] to Discharge to the Pacific Ocean for the City of Morro Bay and Cayucos Sanitary District San Luis Obispo County*; Public Notice No. RB3-2006-0019, NPDES No. CA0047881. The lengthy NRDC comment document was submitted on the final day of the comment period. Given the low key, relatively minor prior involvement of the NRDC in the extensive public hearing and meeting process for the upgrade project implemented over the past three years, MBCSD was completely taken aback at the intensity of the NRDC comments. MBCSD cannot imagine what the NRDC hopes to accomplish by their eleventh hour posturing.

MBCSD requested and was granted permission to respond to NRDC’s comments in an email dated February 23, from Mr. Roger Briggs, the Executive Officer of the Central Coast RWQCB. MBCSD requested the opportunity to respond to the NRDC comments because of the NRDC’s scatter-shot approach to bringing up as many potential issues as possible in the hope that one will strike a chord with the Board or General Public. However, the vast majority of these issues are nowhere to be found in the long administrative record for the upgrade project and have not been otherwise raised, despite the many opportunities for NRDC to do so. This last-minute ambush strategy utilized by NRDC forces the Agency and MBCSD Staff to expend significant effort in responding to the comments, no matter how vague, misguided, or completely unfounded. MBCSD asserts that the NRDC severely misrepresented the data generated by MBSCD’s extremely comprehensive discharge monitoring program. For over two decades, the MBCSD communities have expended substantial amounts of money to develop credible and complete scientific databases, including, but not limited to the assessment of the potential for *T. gondii* contamination. Such expenditures of public funds for critical environmental science and data should not be disregarded in favor of unfounded speculation.

This response to the NRDC comments has consumed vast resources of the two small communities, particularly resources of staff time and effort that could be better utilized on the numerous activities required to complete the upgrade of the plant in the manner prescribed in the Schedule. MBCSD has attempted to respond to the lengthy document submitted by the NRDC, but due to the limited time allowed for this response, we have not attempted to refute every detailed comment contained within the document, but have merely attempted to address as many as feasible in the timeframe allowed and as warranted by their merit.

Our general responses to NRDC’s comments are provided below. More detailed responses are provided in three separate attachments covering different aspects of NRDC’s comments.

- Attachment A consists of a letter report from Marine Research Specialists, *Responses to Technical Comments from NRDC on the NPDES Permit to be Reissued to the MBCSD*.
- Attachment B consists of a letter report from Carollo Engineers, *Re-Issuance of the 301(h) Waiver, Response to Comments by CEA Engineers, P.C. dated February 1, 2006*.

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<sup>1</sup> Grand Jury report: May 5, 2005 Grand Jury final report Cayucos Sanitary District and Morro bay Wastewater Treatment Plant

- Attachment C consists of a letter report from Carollo Engineers, *Re-issuance of the 301(h) Waiver, Response to Comments by NRDC dated February 2, 2006*.

#### **General Comments:**

MBCSD is concerned that the NRDC comments, fraught with numerous inaccuracies, unsubstantiated contentions, and repetitious jargon will detract and misdirect attention away from the credible and complete scientific databases under deliberation during the joint hearing for the renewal of the discharge permit. Per the email dated February 23, from Roger Briggs, the following MBCSD comments are limited only to “a response to the Natural Resource Defense Council's comments - that is,” the issues raised in the NRDC comments. There should no new "issues" raised by MBCSD as they are contained in the NRDC submittal. Contrary to the erroneous, specious, and inaccurate comments submitted by the NRDC, the response prepared by MBCSD and its consultants demonstrates:

- The Reissuance of a 301(h) modified discharge permit is legal and appropriate.
- The MBCSD monitoring data and analyses are timely, comprehensive, and pertinent to the NPDES discharge permit.
- There is no evidence that wastewater constituents enter the Morro Bay Estuary in any ecologically meaningful amount.
- The MBCSD discharge does not pose a tangible human health risk.
- Monitoring data demonstrate the ability of the MBCSD discharge to comply with water-quality objectives
- Limited increases in population over the next decade will not tangibly affect the MBCSD's ability to comply with discharge requirements on TSS and BOD.
- There is no plausible link between the MBCSD discharge and the occurrence of *T. gondii* seropositivity in otters.
- There is no evidence supporting the claim that the area around the MBCSD discharge lacks a balanced, indigenous marine population.
- MBCSD has demonstrated full compliance with the Endangered Species Act and the Marine Mammal Protection Act.
- The Schedule represents an upgrade as soon as reasonably possible and is in the best interest of the local communities.
- The proposed Settlement Agreement is a document thoroughly negotiated, in good faith, with the best interests of all parties involved and is compliant with all applicable law.

#### **Response to Legal and Procedural Comments:**

Part 4 of the NRDC comment letter is fraught with misstatements, erroneous information and relies on citations to law that is not relevant or applicable to the proposed wastewater treatment plant upgrade.

First, it should noted that the respective JPA legislative bodies unanimously directed the upgrade timeline consultant to develop a conversion schedule that upgraded the wastewater treatment plant to full secondary treatment standards as fast as possible.<sup>2</sup> The conversion schedule contained in the Agreement is the schedule recommended by the consultant to comply with the “as fast as possible” action of the JPA parties. The record reveals that MBCSD spent a considerable amount of time debating this critical issue

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<sup>2</sup> See Minutes of JPA Meeting of August, 2005. The specific wording of the motion is as follows: “The quickest way for the existing wastewater treatment plant to be brought to full secondary treatment, including required facility rehabilitation”.

and that the ultimate action reflects a belief that the proposed conversion schedule does bring the wastewater treatment plant up to full secondary standards as fast as possible “taking into account the technological, operational and economic factors.” The NRDC comment letter itself underscores the fact that the issue of upgrading as fast as possible was comprehensively discussed, extensively debated, and ultimately resolved with the adoption of the conversion schedule contained in the Agreement. The fact that during this debate various members of the Morro Bay City Council as well as Regional Board staff members may have commented that it was possible the conversion schedule could be shorter is of no particular moment. Ultimately, the unanimous decision by the JPA parties that a 9.5-year conversion schedule was necessary, based on substantial evidence in the record before them, is determinative.

With regard to this specific issue, none of the litigation cited by the NRDC dealt with the issue of a conversion schedule for a wastewater treatment plant to upgrade to full secondary treatment standards. Rather, each of the cases relied upon involved specific violations of existing permit conditions in the context of a consent decree. The “admissions” relied upon by NRDC are in fact portions of a lively debate over the issue. This underscores the fact that reasonable minds may differ as to what constitutes “as fast as possible” or “as fast as practicable”. As further referenced herein, there have been several similar wastewater treatment plant upgrade projects in California coastal communities that have nine-plus year conversion schedules. Under the NRDC twisted logic, a nine-plus year timeline may be appropriate if the JPA members initiated litigation (preferably protracted litigation) as was the case with Goleta’s ten-year timeline for full secondary treatment upgrade. In point of fact, the proposed conversion schedule is based upon the professional opinion of a well-qualified, highly experienced engineering firm that is very familiar with relevant regulations and process. The Carollo Report itself constitutes substantial evidence, and the “admissions” relied upon by NRDC are nothing more than comments taken out of context that were a part of the debate leading to the JPA parties’ determination on the issue.

In support of the proposition that the conversion schedule is “illegal”, NRDC relies on various statutes (page 57, footnote 320). It should be noted that NRDC recognizes itself that these sections do not apply directly to the Agreement (page 57, footnote 321). However, based on all available evidence in the record, the conversion schedule in the Agreement meets all legal requirements. Specifically, MBCSD determined that when technological, operational, or economic factors that affect the design, development, and implementation of the upgrade project are considered the nine and a half year conversion schedule meets all applicable requirements. The heart of the NRDC argument is that the time allotted for coordination between two governing bodies that own and operate the wastewater treatment plant is unnecessarily long. This is an operational issue that affects the development and implementation of the upgrade project. Contrary to NRDC’s naked assertion that there will be only bi-monthly meetings between the JPA parties, the JPA parties intend to meet as often as is necessary to shepherd the upgrade project to completion within the conversion schedule. The Agreement does not address the number of JPA meetings, and, as with many other NRDC assertions, this issue is without merit.

In Part 5 of its tome, NRDC with no factual support, alleges that the Agreement is seriously flawed because it was not negotiated at arms length in that some of its provisions are “disadvantageous” to the Regional Board and the public. Of course, the Morro Bay City Council and Cayucos Sanitary District Board of Directors also serve the public and are, in fact, directly elected by the public they serve. These governing bodies necessarily have a duty to protect the public they serve and take that duty very seriously.

There is nothing unusual about the manner in which the Agreement came into being. As is almost always the case with complex legal agreements, the Agreement was preliminary negotiated by staff members of each respective agency based on specific direction given to them by the agency governing bodies. The negotiations spanned well over six (6) months and involved many teleconferences, meetings, and preliminary drafts. MBCSD concurs with the NRDC in its statement that the Regional Board should avoid giving “rubber stamp approval” to the Agreement. In this regard, in *US v. Chevron, Inc.*, cited by NRDC for this proposition, the court underscores the strong public policy favoring settlement agreements of this nature. The Chevron court states that “this deference is particularly strong where the (consent) decree has been negotiated by the Department of Justice on behalf of the agency like the EPA which is an expert in its field.”<sup>3</sup> Similarly, Regional Board staff are experts in the wastewater treatment plant permitting process. There is no evidence in the record that supports NRDC’s bold assertion that the Agreement was not negotiated at arms length.

NRDC relies heavily on *US v. Telluride, Co.* 849F.Supp.1400 (D. Colo.1994), in its attack on the Agreement. The Telluride case involved proposed court approval of a consent decree settling pending litigation between a private ski resort company and the Federal government. Telluride, the private ski resort company, had admittedly illegally destroyed forty-four plus acres of recognized wetlands. The primary issue involved appropriate off site wetland mitigation and other penalties. The court refused to approve the consent decree because the record did not disclose the government’s reasoned decision making process and disclosed no negotiations on the part of the government. The Telluride court was not addressing a voluntary wastewater treatment plant upgrade project; it was addressing a potential criminal violation of the Clean Water Act by a private party, and specifically, the monetary penalties, off site mitigation and restoration and the monitoring program associated with the potential criminal conduct. This is a far cry from this matter in which three governmental agencies negotiated in good faith for over six (6) months to arrive at an agreement for a voluntary wastewater treatment plant upgrade project. In fact, Regional Board staff members drafted the initial preliminary agreement, took part in meaningful negotiations over the course of six months and participated in public hearings and meeting which ultimately led to the approval of the Agreement by Morro Bay and Cayucos. Regional staff “pulled the laboring oar” in constructing the essential terms of the Agreement.

Setting aside the bogus criticism of the procedures that led to approval of the Agreement, the substantive issues identified as seriously flawed by the NRDC are in fact reasonable and appropriate.

The liquidated damages provision contained in the Agreement establishes an ultimate fine of one thousand dollars per day if the upgrade is not complete and the wastewater treatment plant is not operating at full secondary treatment standards. That amount is a reasonable estimation of actual damages that the public may suffer if the plant is not operating at full secondary standards at the conclusion of the conversion schedule.<sup>4</sup>

The force majeure clause is a boiler plate clause that is virtually identical to other force majeure clauses contained in other settlement agreements such as the Goleta case. It simply recognizes that MBCSD should not be penalized by events that are beyond their control. This provision is common place, fair and reasonable.

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<sup>3</sup> See *U.S. v. Chevron U.S.A, Inc.*, 380 F. Supp 2nd at 1111

<sup>4</sup> Effluent usually consists entirely of wastewater that has received secondary treatment and solids removal rates have regularly met secondary treatment standards.

NRDC criticizes the “new evidence” definition contained in the Agreement and states that it “illegally sets a more restrictive standard than that set forth in the CWA.” First, the parties cannot agree to a more restrictive standard than required by law. The use of the term “clear and convincing evidence” is purely stylistic and does not relate to any specific evidentiary standard; it merely underscores the need to clearly identify evidence in the record that would show that more stringent discharge limits are necessary.

Lastly, NRDC contends that an out of court settlement agreement is difficult to enforce. MBCSD should not be penalized for entering into a voluntary Agreement without court involvement. The Agreement can, of course, be specifically enforced by a court if there were a breach<sup>5</sup>. While NRDC would prefer court supervision, there is clearly no legal requirement to do so.

In sum, claims by the NRDC that the Agreement is somehow “illegal” or “seriously flawed” are simply without merit.

Response to Collection System Comments:

The comment letter provided by NRDC makes numerous erroneous, misleading and unsupported statements concerning sewage spills from the collection systems of Morro Bay and Cayucos “*into Morro Bay and the Pacific Ocean.*”<sup>6</sup> MBCSD takes exception to these disingenuous statements for several reasons.

First, the reference to the collection systems of Morro bay and Cayucos is not germane to the discussion of the renewal of the discharge permit for MBCSD. The issue of collection system management and sanitary sewer system overflows is currently being addressed by the SWRCB. The SWRCB is expected to adopt statewide Waste Discharge Requirements (WDRs) for all collection systems in California in March 2006. The statewide WDRs are designed to provide consistent regulation and management of all collection systems and to reduce the frequency and occurrence of SSOs.<sup>7</sup> The statewide WDRs include extensive management guidelines and procedures including monitoring and reporting requirements.

Second, while MBCSD does acknowledge that there have been limited and sporadic spills over the past eight years, their performance record clearly demonstrates that the City and District have always operated with a commitment to proactive and responsible management of their respective collection systems. All spills, especially those to surface waters, have been promptly reported to the proper authorities, notices have been posted in a timely manner when required, and the spill as been immediately remediated. In Appendix F of the proposed WDRs, RWQCB staff acknowledges that the City and District staff promptly and appropriately address spills from the collection systems. They state, “*In general, the Dischargers responded to each sewage spill appropriately; the spill was quickly disinfected, proper authorities were notified, creeks and/or beaches were posted if necessary, and maintenance/replacement schedules were adjusted if necessary to prevent future problems.*”

Third, when spills have occurred, they have been sporadic, of limited volume, and occurred over brief periods of time (minutes or hours). They are completely unlike the non-point-source pollution generated by large rain events, which produces astronomical volumes of flow over an extended duration, lasting

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<sup>5</sup> Settlement Agreement, Section E.2.

<sup>6</sup> NRDC at 12

<sup>7</sup> Sanitary Sewer Overflows

hours if not days. The volume of particulate matter and pathogens released from documented collection system spills is infinitesimally small when compared with the non-point source pollution documented by the RWQCB and National Estuary Program. There is no evidence presented in the NRDC document to support the specious claim that “*sewage spills that may and likely do affect marine life.*”

The NRDC comment letter also incorrectly insinuates that these spills are “...an obvious source of pathogens”<sup>8</sup> and that “*Untreated sewage from the Plant’s collection systems periodically spills into Morro Bay and the Ocean*” and is responsible for “*the available evidence related to the epicenter of Toxoplasma gondii-related disease in sea otters in Morro Bay*”<sup>9</sup>. There is simply no basis for this statement. As stated above, documented and reported spills over the past eight years, have been infrequent, limited in volume, and of very limited duration, especially when compared with the contaminant input from non-point sources.

Finally, NRDC’s lack of understanding of collection-system spills and non-point source contributions is demonstrated by the absurd statement that “*Moreover, total coliform limits were consistently exceeded at the Morro Creek surf zone monitoring station. Heightened bacteria levels at this station implicate input from the Plant’s collection system.*”<sup>10</sup> First, the Morro Creek surf zone monitoring station was added in 1993 to document the time-varying influence of non-point-source coliform input from nearby creeks. Coliform densities in the creek’s outflow aid in the interpretation of surfzone bacteriological measurements by providing an index of non-point-source contamination in samples collected at the regularly sampled surfzone stations. Second, and more importantly, MBCSD staff is aware of only one spill to Morro Creek and that occurred from the treatment plant and not the collection system. It occurred on December 31, 2004, when Morro Creek overflowed its banks and flooded the influent channel of the treatment plant.<sup>11</sup> Sampling of Morro Creek performed at the time of the spill documented elevated coliform levels upstream of the location of the spill, indicating that the creek was already contaminated with non-point-source bacteria unrelated to the spill. The spill was of limited duration (45 minutes) and the wastewater released had previously undergone primary treatment. The particulate and pathogen loads caused by the release of primary treated wastewater to the creek were infinitesimally small when compared to the volume carried to the ocean by Morro Creek during this extreme rain event. Again, non-point source pollution has been well documented in all creeks throughout the watershed, including Morro Creek, over the past decade.

The City and District have always been sensitive to the quality of the local marine environment within Estero Bay, and have operated and maintained the WWTP with a commitment and dedication to protection of the local ecology and coastal resources. We are committed to continuing and enhancing the high levels of wastewater treatment at the WWTP with the goal of preserving the beneficial uses of the marine environment within Estero Bay. The Schedule to upgrade the plant demonstrates the communities’ continued commitment to preserving the quality of the local marine environment.

If you have any question or require any further information, please contact me at (805) 772 6272.

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<sup>8</sup> NRDC at 12

<sup>9</sup> NRDC at 12

<sup>10</sup> NRDC at 44

<sup>11</sup> A description of the events leading to the spill and the corrective actions instituted to prevent such an occurrence in the future are well documented in the spill report, monthly operations reports, and the 2004 Annual report

Sincerely,

A handwritten signature in black ink that reads "Bruce Keogh". The signature is fluid and cursive, with the first name "Bruce" and last name "Keogh" clearly legible.

Bruce Keogh  
Wastewater Division Manager

cc  
Mr. Bob Hendrix  
City of Morro Bay

Ms. Bonnie Connelly  
Cayucos Sanitary District

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